IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO.261 OF 2005
IN
NOTICE OF MOTION NO.4502 OF 2004
IN
SUIT NO.5289 OF 2004
WITH
CIVIL APPLICATION NO.207 OF 2006
AND
CIVIL APPLICATION NO.217 OF 2006

Shatrughan Sinha,
Adult, Indian Inhabitant,
aged about 62 years,
Residing at 49, "Ramayan",
9th Road, J.V.P.D.Scheme,
Mumbai - 400 049. ...Appellant (Ori.Deft.No.1)

Versus

1.Mr.Gurudev Singh Mann,
Adult, Indian Inhabitant,
Residing at Flat No.4,
Luv Kush, 5th Gulmohar Cross Road,
Plot No.17, J.V.P.D. Scheme,
Juhu, Mumbai - 400 049.

2.Mr.Rajiv Salkar,
Adult, Indian Inhabitant,
Residing at Flat No.5,
Luv Kush, 5th Gul Mohar Cross Road,
Plot No.17, J.V.P.D. Scheme, Juhu,
Mumbai - 400 049.

3.Mr.Vijay I.Madhrani,
Adult, Indian Inhabitant,
Residing at Flat No.6,
Luv Kush, 5th Gul Mohar Cross Road,
Plot No.17, J.V.P.D. Scheme, Juhu,
Mumbai - 400 049.

4.Mr.Prakash C.Silaichia,
Adult, Indian Inhabitant,
Residing at Flat No.3,
Luv Kush, 5th Gul Mohar Cross Road,

Plot No.17, J.V.P.D. Scheme,
Juhu, Mumbai - 400 049.

5.Municipal Corporation of Gr.Mumbai,
a body incorporate under the
Bombay Municipal Corporation Act,
having its address at
Mahapalika Marg, Fort, ...Respondents
Mumbai - 400 001. (Ori.Deft.No.2)

.....

Mr.C.U.Singh with Mr.Girish Kulkarni &
Mr.H.Rahman i/b M.V.Kini & Co. for Appellant.

Mrs.Uma C.Wagle for Respondents 1 to 4.

Mrs.Geeta Joglekar for Respondent No.5.

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CORAM: A.M.KHANWILKAR, J.

JULY 25, 2006.

ORAL ORDER :

1. Heard Counsel for the parties.

2. Admit. Matter is made returnable forthwith, by consent. Mrs.Wagle waives notice for Respondents 1 to 4. Mrs.Joglekar waives notice for Respondent No.5.

3. As short question is involved, Appeal from Order is taken up for final disposal forthwith, by

consent.

4. This Appeal from Order takes exception to the Judgment and Order passed by the Bombay City Civil Court dated December 21, 2004 in Notice of Motion 4502 of 2004 being L.C. Suit No.5289 of 2004.

5. The Respondents 1 to 4/Plaintiffs filed suit against the Appellant/Defendant No.1 and Respondent No.5/Defendant No.2 for the following reliefs:

> "(a) this Hon'ble Court may be pleased to grant leave under Order II Rule 2 of the Code of Civil Procedure;
>
> (b) this Hon'ble Court may be pleased to restrain the Defendant No.1 by order of permanent injunction from covering the suit passage, which is shown in green colour boundary in the rough sketch at Exh.A hereto;
>
> (c) this Hon'ble Court may be pleased to restrain Defendant No.1 by order of permanent injunction from opening the suit gate, which is shown in blue colour boundary in the rough sketch at Exh.A hereto;
>
> (d) this Hon'ble Court may be pleased to direct the Defendant No.1 to restore the original position of the said Flat on the

ground floor in the premised known as Luv Kush situated at 5th Gulmohar Cross Road, Plot No.17, JVPD Scheme, Juhu, Mumbai-400 049, by closing the suit entrances and reconstructing the walls, which were demolished and by removing the steps, which he has already constructed in the suit passage from one of the suit entrances;

(e) this Hon'ble Court may be pleased to direct Defendant No.2 to initiate appropriate action against Defendant No.1 for the construction carried by Defendant No.1 in an outside the said Flat on the ground floor in the premises known as Luv Kush situated at 5th Gulmohar Cross Road, Plot No.17m, JVPD Scheme, Juhu, Mumbai-400 049;

(f) this Hon'ble Court may be pleased to restrain Defendant No.2 by order of permanent injunction from regularizing the construction of suit entrances, which is shown in red colour boundary in the rough sketch at Exh.A hereto, and/or granting permission fro covering the suit passage, which is shown in green colour boundary in the rough sketch at Exh.A hereto;

(g) pending the hearing and final disposal of the Suit, Defendant No.1 be restrained by an order of Injunction from opening the suit gate, which is shown in blue colour boundary in the rough sketch at Exh.A hereto, and from covering the suit passage, which is shown in green colour boundary in the rough sketch at Exh.A hereto;

(h) pending the hearing and final disposal of this suit, this Hon'ble Court may be pleased to direct Defendant No.1 to seal/lock the suit entrances, which is shown in read colour boundary in the rough sketch at Exh.A hereto, and not to use the same;

(i) pending the hearing and final disposal of this Suit, this Hon'ble Court may be pleased to direct Defendant No.2 to initiate appropriate action against Defendant No.1 for the aforesaid constructions in and outside the said Flat;

(j) pending the hearing and final disposal of this Suit, this Hon'ble Court may be pleased to restrain Defendant No.2 by order of permanent Injunction from regularizing the construction of suit entrances and/or granting permission fro covering the suit passage;

(k) ad-interim orders in terms of prayer clause (g) to (j) above be granted;

(l) any such other and further reliefs as this Hon'ble Court may deem fit and proper in the circumstances of the case;

(m) for cost of the Suit."

6. During the pendency of the said Suit, Plaintiffs took out Notice of Motion for interim relief being Notice of Motion No.4502 of 2004 for the following reliefs:

(a) pending the hearing and final disposal of this Suit, Defendant No.1 be restrained by an order of injunction from opening the suit gate, which is shown in blue colour boundary in the rough sketch at Exh.A hereto, and from covering the suit passage, which is shown in green colour boundary in the rough sketch at Exh.A hereto;

(b) pending the hearing and final disposal of this Suit, this Hon'ble Court may be pleased to direct Defendant No.1 to seal/lock the suit entrances, which is shown in red colour boundary in the rough sketch at Exh.A hereto, and not to use the same;

(c) pending the hearing and final disposal of this Suit, this Hon'ble Court may be pleased to direct Defendant No.2 to initiate appropriate action against Defendant No.1 for the aforesaid constructions in and outside the said Flat;

(d) pending the hearing and final disposal of this Suit, this Hon'ble Court may be pleased to restrain Defendant No.2 by order of permanent injunction from regularising the construction of suit entrances and/or granting permission for covering the suit passage;

(e) this Hon'ble Court may be pleased to grant leave under Order II Rule 2 of the Code of Civil Procedure;

(f) ad-interim and interim reliefs in terms of prayers (a) to (d) may be granted;

(g) for costs of the Notice of Motion may be provided for;

(h) any such other and further reliefs may be granted."

7. The Trial Court after considering the rival case, however, made the Notice of Motion absolute in terms of prayer clause (a) only. The

operative order passed by the Trial Court reads thus :

"ORDER

"1. Notice of Motion No.4502 of 2004 is made absolute in terms of Prayer Clause (a).

2. There is no Order as to cost.

3. Pending the hearing and final disposal of the suit Defendant No.1 is hereinafter restrained by an Order of Injunction of this Court from opening the suit gate shown in blue colour boundary in rough sketch Ex.A and from covering the suit passage shown in green colour boundary in the rough sketch at Ex. A to the Plaint.

4. In so far as prayers clauses b, c and d are concerned, the same are rejected at this stage.

4. In view of the grievances by and between the plaintiffs and defendant No.1, I am inclined to expedite the hearing of the suit and the Plaintiffs are directed to serve the writ of summons upon defendant No.1 and Corporation at the earliest.

5. Suit adjourned to 19.1.2004 at 10.30 for direction."

8. Although the order of injunction passed by the Trial Court is in two parts namely, restraining the Appellant from opening the suit gate shown in blue colour boundary in rough sketch Exhibit-A and

also from covering the suit passage shown in green colour boundary in the rough sketch at Exhibit-A to the Plaint, however, during the course of hearing of this Appeal, Counsel for the Appellant made it clear at the outset that he was not challenging the second part of the impugned order as the Appellant had no intention of covering the northern common passage of the Suit building at present or till the disposal of the Suit pending before the Trial Court. In other words, the Appellant has confined challenge only with regard to the first part of the impugned order restraining the Appellant from opening the suit gate shown in blue colour boundary in rough sketch at Exhibit-A to the Plaint, which is commonly known as ‘Northway’. This is the limited controversy which I intend to examine in this order.

9. The lower Court in the impugned Judgment has adverted to the pleadings and documents filed by the respective parties in extenso. It is not necessary to reproduce the same in detail in this Order to avoid repetition. However, I shall advert to the relevant pleadings and documents only for

the limited purpose of considering the challenge in the present Appeal with regard to injunction against the Appellant not to open the northern gate in the suit building, wherever necessary.

10. Before I proceed to analyse the rival case with regard to this challenge, I think it necessary to advert to the two issues which will arise for my consideration in this Appeal on the basis of submissions made by the Counsel across the bar. The first question that will arise for my consideration is: whether the Appellant is right in contending that in view of the nature of agreement between the parties, the Appellant can exclusively use the northern gate for his ingress and egress to the exclusion of the Respondents/Plaintiffs? Secondly, whether the injunction as granted by the lower Court restraining the Appellant from opening the suit gate (northern gate) can be sustained?

11. I think it necessary to straight away advert to the rights of the respective parties with regard to the suit property. It is seen from the

documents executed between the parties that the Appellant along with his wife Mrs.Poonam Shatrughan Sinha purchased interest in respect of Plot No.17, corresponding CTS No.14-A/7 of Vile Parle (West), Taluka Andheri, admeasuring 815 sq.mtrs. belonging to the Greater Bombay Co-operative Housing Society Limited. As per bye-law No.7, the Appellant and co-owner was entitled to only assign part of the structure in favour of any person or persons who in turn were entitled to be admitted as nominal member of the said society on payment of specified amount as entrance fee having no right of membership or to receive any advantage or claim any right in the share or interest in the capital of the Society or the original member (Appellant) and any dispute between the nominal member of the Society and/or regular member arising out of the lease or the membership of the units was subject matter of reference under Section 91 of the Maharashtra Cooperative Societies Act, 1960. The documents executed between the Appellant and the Respondents/Plaintiffs would indicate that the Appellant was to remain the lessee of the plot in question. So far as the right created in favour of

the Respondents/Plaintiffs, that can be discerned from the documents executed between the parties such as Memorandum of Understanding, Agreement for Sale and Deed of Transfer. It is seen that the terms and conditions specified in Memorandum of Understanding and Agreement for Sale are *pari materia* same. In addition to the said terms and conditions in the above said two documents, the Deed of Transfer executed between the parties, refers to the right of the Respondents/Plaintiffs with regard to the appurtenances to the premises sold to the Plaintiffs and right to enjoy common amenities. I shall advert to this aspect a little later.

12. The Memorandum of Understanding executed between the parties indicates the description of the premises sold by the Appellant and purchased by the respective Plaintiffs. The terms and conditions in these documents being common, I shall refer to the Memorandum of Understanding executed in favour of Vijay Ishwardas Madhrani/original Plaintiff No.3 (Respondent No.3 herein). On reading relevant clauses pressed into service by

the respective parties being clauses (t), (u), (v) of the recital and clauses 5, 14, 31 and 32, it is seen that concerned flat in the building to be constructed by the Appellant on Plot No.17 was sold by the Appellant in favour of the respective Plaintiff. Clause (u) refers to the description of the flat. Clause (v) of the recital provides that the purchaser has agreed to purchase the said premises for the price and upon terms and conditions agreed to between the parties. In clause 5, it is provided that notwithstanding anything contained in the said presents, it is strictly understood that the intending purchasers (Plaintiffs) were fully aware that by virtue of the restrictions imposed by the Society not to transfer the leasehold interest in respect of the demised land, the intending vendor (Appellant) shall always be entitled to put up additional construction or constructions on the demised land at any time without any consent being obtained from the intending purchasers. It is further provided that such consent is not always necessary, provided the area of the premises is not reduced or the strength of the building is not to be affected. It is then

provided that out of abundant precaution, the intending purchasers (Plaintiffs) give their irrevocable consent in favour of the intending vendor (Appellant) to put up any additional construction on the existing property under construction without any permission being obtained from the intending purchasers. It will be useful to now refer to clause 14 of the Memorandum of Understanding. It provides that the intending vendor (Appellant) has informed the intending purchasers (Plaintiffs) that it is not possible to create any right, title or interest in respect of the land beneath the said premises as the intending vendor is the lessee in respect of the said plot and is bound to observe and perform the terms and conditions of the lease granted by the society. It is then provided that the intending vendor has further informed the intending purchasers that by virtue of the bye-laws of the said society, the intending vendor is incapable of creating any right, title or interest in respect of the demised premises. Reference was then made to clauses 31 and 32 of the Memorandum of Understanding by the Counsel appearing for the parties. The same read

thus:

"Notwithstanding anything contained in these presents, it is strictly understood by and between the parties hereto as follows:

a. the Intending Vendor shall always be entitled to pay up any additional construction on the said property from time to time and at all times without obtaining the permission from the Purchaser/s. The Purchaser/s has given his/her/their irrevocable consent in favour of the Intending Vendor for such additional construction/s;

b. the F.S.I. if increased in future or if the right to load the T.D.R. is available for the purpose of its loading in the said property being a receivable plot, the same shall be utilized by the Intending Vendor and the Intending Purchasers shall not be entitled to any rebate in the consideration or any compensation;

this Memorandum of Understanding is restricted to the Sale of the said premises on ownership Basis but not under the provisions of the ownership Flats Act, 1963;

32. As recited hereto before, the Intending Vendor shall complete the sale in favour of the Intending Purchasers upon the Intending Purchasers making full payment as contemplated in clause 2 above. Such Deed of Sale shall interalia amongst

other terms and conditions contain;

the Intending Vendor shall be entitled at all times to construct additional floors by virtue of the Intending Vendor being the Lessor of the said Plot of land and the Intending Vendor alone shall be entitled to deal with such additional construction;

the Intending Vendor shall be entitled to carry out such additional construction without withdrawing the Intending purchaser’s right of easement of light, air and water in respect of the said premises;

if at any time for any reason whatsoever the building is destroyed or required to be pulled down under order of any authority or on account of any mismajeure, the Intending purchasers shall be entitled to acquire the premises on this re-construction to the extent of the area of the said flat upon the Intending purchasers contributing the cost of construction, such cost of construction shall be paid as determined by the Architects of the Intending vendor and the Intending purchasers;

if at any time any repairs, maintenance and other works in respect of the building on the said plot as a whole including the Intending purchasers said premises shall be required to be carried out, the Intending vendor shall carry out the same and the Intending purchasers shall forthwith on demand pay the proportionate share of such expenses (as determined by the Intending vendor’s and the Intending purchasers Architects and failing an umpire to be appointed by the said Architects);

usual covenants for productions of the title deeds shall be provided.

> absolute right of the purchaser/s to sell the said premises to any person or persons."

13. The terms and conditions specified in the Agreement for Sale are *pari materia* same to the Memorandum of Understanding.

14. As mentioned earlier, the Deed of Transfer executed between the parties, however, provides for additional terms and conditions than the one specified in the Memorandum of Understanding and Agreement for Sale. I will therefore now advert to the relevant terms and conditions of the Deed of Transfer. Clauses (s), (t), (u) and (v) of the recitals of this document are para materia same to the clauses (s), (t), (u) and (v) of the Memorandum of Understanding. In the main body of the Deed of Transfer, in clause (c) (page 117) it is additionally agreed between the parties as follows:

> "(c) ALL AND SINGULAR the irrevocable licence to park one car in the compound of the said building known as Luv Kush without any consideration but subject to the payment of the Property Taxes if levied by the said Corporation."

. The transferor in the clause pertaining to covenants by the transferor with the transferee, clause (b) in particular, it is agreed between the parties as follows :

> "(b) it shall be lawful for the Transferees from time to time and at all times hereafter to peaceably and quietly hold enter upon have occupy possess and enjoy the said premises hereby sold and transferred (however, subject to the grant of Occupation Certificate) with its appurtenances to the said premises and receive the rents issues and profits thereof and of every part thereof unto and for their own use and benefit without any suit lawful eviction interruption claim or demand whatsoever from or by any person/s lawfully or equitably claiming or to claim by from through under or in trust for him, the Transferor however, subject to the prior permission in writing from the said society. FREE AND CLEAR and freely and clearly and absolutely acquitted exonerated released and for ever discharged or otherwise by him well and sufficiently saved defended kept harmless and indemnified or from and against all former and other estates titles charges and encumbrances whatsoever either already or to be hereafter had made executed occasioned or suffered by him or by any person/s lawfully or equitably claiming or to claim any estate by from through under or in trust for him or any of them."
> (emphasis supplied)

. From the plain language of these conditions, it is obvious that the transferees

(Plaintiffs) shall lawfully from time to time and at all times remain in peaceful and quite possession and hold, enter upon, occupy, possess and enjoy the premises sold and transferred in their favour with its appurtenances to the said premises etc. The other relevant term from this document-Deed of Transfer is, clause (i) of the confirmation by the transferees that they are fully aware about the basis of purchase, which clause reads thus :

> "(i) the common amenities and services like water supply, water pump, water tanks, electric connections, etc. provided in the said Building are to be shared and enjoyed by the Transferees and the other holders of other premises and they shall avail of the same jointly and bear the expenses on repairs, maintenance, etc. on account thereof in the proportion to the area of their respective premises and the Common Terrace shall remain with the Transferor being the Lessee, however, the Transferor shall permit the Transferees and other Acquirers of such premises to use the common Terrace as and when occasion arises." (emphasis supplied)

15. According to the Plaintiffs, on conjoint reading of clause (b) and clause (i) referred to above, it is abundantly clear that the Plaintiffs had right to enjoy the common passage of the suit

building as described in the plans appended to the Agreement.

16. For answering the first question posed in the earlier part of the Order, it will be necessary to ascertain whether the documents executed between the parties make provision that the Appellant will have exclusive right to enjoy the common passage to the northern side of the building. In my opinion, there is no express provision in any of the agreements to that effect. There is neither negative covenant in any of these documents so as to deprive the Plaintiffs from using the northern common passage of the building. In other words, the documents in question would indicate that both the Plaintiffs as well as the Appellant have common right to jointly enjoy the common passage in the suit building whether on the northern side or the southern side. On this finding, the first question will have to be answered against the Appellant. In other words, it is not possible to hold that the Appellant can exclusively use the northern passage of the suit building as such.

17. It is not necessary for this Court to burden this Order with the reasoning recorded by the Trial Judge on the several other issues at this interlocutory stage. For, as mentioned earlier, the Appellant is not challenging the other part of the injunction order passed by the Trial Court which restrains the Appellant from covering the northern common passage of the suit building. Suffice it to hold that the Appellant cannot obstruct quite and peaceful enjoyment of the common passage even on the northern side of the building to the Respondents/Plaintiffs.

18. The next question is: whether the Appellant is right in contending that the Appellant can exclusively use the northern gate. For the finding which has been recorded in the earlier part of the Order, for the same reasons, it is not possible to accept the stand taken by the Appellant at this stage that he alone would be entitled to use the northern gate of the suit building to the exclusion of the Plaintiffs.

19. That takes me to the second question that

has been noted earlier. With reference to this question, it was vehemently contended on behalf of the Respondents/Plaintiffs that the northern gate which has been closed for over six years should not be opened, as that will jeopardise the security of the residents of the building. It was also contended that the children of the occupants of the building use that portion of the building for playing. In this context, it will be useful to advert to the averments in the plaint.

20. In paragraph 1 of the Plaint, it is stated that the Appellant has illegally carved out three entrances on the ground floor flat owned and possessed by him and is trying to cover up the common passage on the northern side of the flat which is a common parking area and playing space for the children. In paragraph 3 of the Plaint, it is asserted that the Defendant No.1 constructed the building known as Luv Kush and agreed to sell the respective flats to the Plaintiffs. As per the agreement, the Plaintiffs were entitled to enjoy their respective flats with its appurtenances. It is further asserted that similarly the common

amenities and services in the said premises were to be shared and enjoyed by the Plaintiffs and Defendant No.1 and they were required to avail of the same jointly and bear the expenses for the repairs, maintenance, etc. on account thereof in proportion to the area of their respective flats. It is then asserted that the common passage of the said premises was used in common by all the flat occupants. They have developed garden in the portion of the said passage and planted trees therein. A full time gardener is employed for maintaining the said common garden. All the flat owners are contributing for the maintenance of the said common garden. The common passage is beautified by all the flat owners and they are maintaining the same. The Plaintiffs are sharing the taxes in respect of the said premises. In Paragraph 4 of the Plaint, it is averred by the Plaintiffs that the Plaintiff No.1 has verbally given a license to Defendant No.1 to park two more cars in the common passage, pursuant to which, the Plaintiff No.1 has been parking two cars in the said common passage. It is further stated that the Plaintiffs Nos.1 to 3 are parking their respective

cars in the common passage from 1997 till date. It is then stated that for the proper use and peaceful enjoyment of their respective flats, the Plaintiffs have right to park their cars in the common passage. The Plaintiffs' children are also using the said common passage for playing. In Paragraph 6 of the Plaint, Plaintiffs have expressed apprehension about the design of the Defendant No.1 (Appellant) was to cover up the suit passage (northern common passage) so as to exclusively use the same. It is then stated that the Defendant No.1 was trying to open the suit gate (northern gate) which is kept locked for past six years for security reasons. In Paragraph 7, it is stated that being aggrieved by such illegal acts of the Defendant No.1, legal notice was sent to Defendant No.1. It is then stated that instead of remedying the mischief, the Defendant No.1 asserted that he would exclusively use the northern common passage and the northern gate for himself. In Paragraph 16 of the Plaint, reference is made to the fact that Defendant No.1 under the excuse that he needs to use the suit gate (northern gate) exclusively for security reasons, is trying to encroach upon the

common passage and use the suit passage and the suit gate through one of the suit entrances and have bungalow like atmosphere and facilities. It is in this backdrop, the Plaintiffs filed Suit for the reliefs already reproduced earlier.

21. The question is: whether it is possible to accept the stand of the Respondents/Plaintiffs that it is not permissible for the Appellant/Defendant No.1 to open the northern gate? In my opinion, having analysed the documents executed between the parties, it is abundantly clear that the northern gate has been provided in the original sanction plan. The sanction plan is appended to the Agreement executed between the parties. The fact that the northern has been provided in the original sanction plan, presupposes that the Defendant No.1, who constructed the building, had made provision for two gates to the suit building - May be, one for ingress and the other for egress for the vehicles and occupants. It is also noticed that rooms for security guards have been provided near the respective gates in the original plan. I have already taken the view that

the documents executed between the parties nowhere provide that the Appellant can exclusively use the northern common passage of the suit building. Nor there is any negative covenant prohibiting the Plaintiffs from using that portion of the building. The gate provided to the building obviously will have to be held as common facility to be enjoyed by the occupants of the building.

22. Reverting to the stand taken by the Respondents/Plaintiffs that it is not open to the Appellant to open the northern gate, that cannot be countenanced. None of the documents which are pressed into service can substantiate the stand taken by the Respondents/Plaintiffs in this behalf. As mentioned earlier, in the original sanction plan, provision is made for two gates to the suit building. The fact that the northern gate has not been used for six years, that fact cannot translate it into a right in favour of the Respondents/Plaintiffs so as to contend that the said gate cannot be opened at all in posterity. There is no provision in the documents executed between the parties preventing the Appellant to do

so, who is the lessee in respect of the demised land and is also owner of ground floor premises and basement. Viewed thus, the argument of the Respondents that the northern gate cannot be opened or operated at all, cannot be countenanced.

23. Counsel appearing for the Respondents had placed emphasis on the definition in Rule 3(7) of the Development Control Rules, which defines expression "amenities". For the reason already recorded earlier, it is not necessary to go into the rival submission that the said provision cannot be invoked for considering the right of the party in respect of private land or more particularly, right to enjoy common passage in the building on such private land. Suffice it to observe that it is not possible to sustain the conclusion reached by the Trial Court that the northern gate cannot be allowed to be operated because the same has remained closed for over six years. The fact that it has remained closed for over six years, cannot be the basis to grant temporary injunction. There has to be some right in favour of the parties claiming such injunction and express agreement

between the parties that the said gate, though provided to the suit building, shall remain closed forever. In absence of such express understanding between the parties, it is not possible to sustain the order of temporary injunction passed by the Trial Court restraining the Appellant from opening the northern gate of the suit building.

24. As I have already found earlier that the Appellant cannot claim exclusive user of the northern common passage as also the northern gate, it necessarily follows that the Respondents/Plaintiffs can also use the northern gate along with the Plaintiffs, if kept open and proper security arrangement as is provided to the other gate is also provided with regard to the northern gate.

25. Counsel for the Appellant in the alternative submits that during the pendency of the Suit, the Appellant shall have no difficulty in permitting the Plaintiffs to avail of that arrangement, however, that should be made subject to the outcome of the Suit and without prejudice to

the rights and contentions of the parties. Needless to observe that the opinion recorded in this Order is only a tentative opinion for the purpose of deciding the issue as to grant of interim injunction. The Suit will have to be decided on its own merits in accordance with law, uninfluenced by any of the observations made in the impugned Judgment or for that matter, the present order.

26. Counsel for the Respondents/Plaintiffs at one stage, made fervent attempt to persuade the Court that although the operative order records that other reliefs claimed by the Plaintiffs have been rejected, in fact, even those reliefs have been granted by the Trial Court. It is not possible to accept this submission. In fact, the operative order plainly rejects prayer clauses b, c and d.

27. As mentioned earlier, I have confined the enquiry in this Appeal only to the limited grievance made by the Appellant regarding the order of injunction against the Appellant not to open the

northern gate of the suit building. I have not entered into any other controversy or dispute between the parties.

28. Counsel for the Appellant during the course of argument placed reliance on two decisions. One reported in **1988(4) BCR 97 in the case of Omprakash Tulsiram & Ors. vs. M/s.H.J.Leach & Co.** The second decision is of the Supreme Court reported in **AIR 1979 SC 861 in the case of Avadh Kishore Dass vs. Ram Gopal & Ors.**

29. Insofar as the latter decision of the Supreme Court is concerned, the same has no bearing on the point in issue. Inspite of close reading of the said Judgement, I was unable to discern as to for what purpose the same has been pressed into service on behalf of the Appellant. Perhaps, the Appellant intended to place reliance on the Judgment of the Supreme Court in **AIR 1979 SC 867 in the case of M/s.Orient Distributors vs. Bank of India Ltd. & Ors.**, copy of which Judgment has not been made available to me. That decision is referred to in the Judgment of this Court in the

case of **Omprakash Tulsiram (supra)**. Obviously, it is a mistake committed by the Advocates for the Appellant while making photo copy of the relevant Judgment. Nevertheless, the Counsel appearing for the parties were expected to verify the copy before handing it over to the Court. Neither the Advocate on record has bothered to examine that position nor the Senior Counsel who handed in the photo copy of the Judgement to the Court ensured that correct copy was being tendered to the Court. The members of the Bar are expected to take minimum care of scrutinising the documents before handing over the same to the Court at the hearing of a case. Be that as it may, the decision in the case of **Omprakash Tulsiram (supra)** deals with the matter between tenant and landlord. The legal position stated in this decision is that the tenant can claim right of prescription only in the premises in tenant asserts right of having been let out or is provided as right of way or appurtenances to the holding or by way of interest. Mere user of any premises other than the premises let out cannot create a right so as to succeed in getting injunction against the landlord.

30. For the reasons already recorded in the earlier part of this Order, this Appeal succeeds to the extent that the order passed by the Trial Court injuncting the Appellant from opening the suit gate (northern gate) shown in blue colour boundary in rough sketch Exhibit-A, is set-side. In other words, it will be permissible for the Appellant to open the said gate subject to the observations made in this Order that the Appellant shall not cause any obstruction to the Plaintiffs to use the common passage on the northern side and the northern gate for the purposes of ingress and egress. Needless to observe that it will be open to the parties to regulate the movement of entry to the building from one gate and exit from other gate; if that arrangement is acceptable to the parties for security reasons, the parties will abide by that arrangement.

31. As the Suit is already expedited by the Trial Court, it is not necessary to issue further directions in that behalf. However, it is made clear that the parties shall extend full

cooperation to the Trial Court for early disposal of the Suit.

32. Appeal and the accompanying Civil Applications disposed of with the above observations. No order as to costs.

A.M.KHANWILKAR, J.